IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL NO. 91-578-JLF**
	)	
N.L. INDUSTRIES et al.,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

FOREMAN, Chief Judge:

The Government has asserted claims against defendant First Granite City National Bank ("the Bank" or "the Trustee") under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA)[1], 42 U.S.C. §§9601 *et seq.* First Granite

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[1]/ Section 106 of CERCLA provides:

> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

42 U.S.C. §9606(a).

Section 107 of CERCLA provides:

> Notwithstanding any other provision of law, and subject only to the defenses set forth in subsection (b) of this section --
>
> (1) the owner and operator of a vessel or a facility,

City National Bank is named as a defendant because it is the trustee of First Granite City National Bank Trust No. 454 ("Trust 454"), an Illinois land trust. The Bank has moved to dismiss the complaint against it on the grounds that the trustee of an Illinois land trust is not an owner of a facility to subject it to CERCLA liability. The Court agrees that the trustee of an Illinois land trust cannot be considered an owner of a facility under CERCLA, and therefore will dismiss the complaint against the Bank.

An Illinois land trust provides a unique form of ownership of real property. The trustee of a land trust under Illinois law holds both the legal and equitable title to the land. The beneficiary of the trust is left with a personal property interest in the land. However, the beneficiary (or his properly appointed agent) has the exclusive power to direct or control the

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> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
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> . . .
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> shall be liable for --
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> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
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> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
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> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such an injury, destruction, or loss resulting from such a release; and
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> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. §9607(a).

trustee in dealing with the title and the exclusive control of the management, operation, renting and selling of the trust property together with the exclusive rights to the proceeds from the property. The only power the trustee has in relation to the land is the power to convey title; the trustee can only use this power when properly authorized by the beneficiary.

The Illinois Supreme Court discussed the nature of a land trust under Illinois law at some length:

> The Illinois land trust is a unique creation of the Illinois bar, though its acceptance elsewhere has received a great deal of attention. Its origin is rooted in the case law rather than statute. The land trust has, over the years, served as a useful vehicle in real estate transactions for maintaining secrecy of ownership and allowing ease of transfer. Despite recent disclosure statutes [] the land trust remains a widely utilized and useful device
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> In a land trust, the legal and equitable title lies with the trustee and the beneficiary retains what is referred to as a personal property interest. It is important to note, however, that though referred to as personal property, most of the usual attributes of real property ownership are retained by the beneficiary under the trust agreement. In fact, the only attribute of ownership ascribed to the trustee is that relating to title, upon which third parties may rely in transactions where title to the real estate is of primary importance. A third party, even the State, may generally rely on the title of trustee in such cases.
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> * * *
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> The term "owner", as applied to land, has no fixed meaning applicable under all circumstances and as to any and every enactment. It usually denotes a fee simple estate, but in Illinois it may include "one who has the usufruct, control, or occupation of land with a claim of ownership, whether his interest be an absolute fee or a less estate." Title to property does not necessarily involve ownership of the property. Title refers only to a legal relationship to the land, while ownership is comparable to control and denotes an interest in the real estate other than that of holding title.

People v. Chicago Title & Trust Co., 75 Ill.2d 479, ___, 389 N.E.2d 540, 543-44 (1979) [internal citations omitted].

The nature of a land trust under Illinois law is discussed at some length since it is only with an understanding of the rights and duties of a trustee (which are, of course, governed by Illinois law) that one can determine whether the trustee is an owner of the facility under CERCLA. The Bank asserts that its extremely limited powers as a trustee remove it from the category of owner. The Government, in response, asserts that as a titleholder the Bank is an owner, regardless of how limited its rights of ownership may be.

CERCLA is not very helpful in deciding this question. Under CERCLA, "[t]he term 'owner or operator' means . . . in the case of an onshore facility, any person owning or operating such facility." 42 U.S.C. §9601(20)(A)(ii). The term "owner" indicates some level of control over the land or the receipt of some benefit from the land. The extent of control or benefits necessary to be considered an owner under CERCLA is not clear from this definition.

The trustee, under the terms of an Illinois land trust, has no control over the management of the land and receives no benefit from the land[2]. The best description of the trustee in an Illinois land trust is a bare titleholder. Therefore, the Illinois land trust is, in one sense, just a form of registering title. The trustee of an Illinois land trust should not be considered an owner of a facility under CERCLA.

The Government also argues that principles of statutory construction require that a bare title holder be considered a potentially liable party under CERCLA. The Government points to two exceptions to the liability of an "owner" under CERCLA. The first exception

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[2]/ The Bank does receive, however, a fee for its administration of the trust. According to the Bank, this fee amounts to $75 for opening the trust, and $25 per year for administration of the trust.

to liability is for a state or local governmental unit which acquires ownership or control of a facility involuntarily by virtue of its function as a sovereign. 42 U.S.C. §9601(20)(D). The Government argues that this exemption indicates that Congress intended liability to exist on the basis of possession of title alone.

The Government relies on *Pennsylvania v. Union Gas Company*, 491 U.S. 1, 109 S.Ct. 2273 (1989), which held that Congress waived a state's sovereign immunity to private parties under CERCLA. In reaching this conclusion, the Supreme Court discussed the exemption for states who obtain title involuntarily as a result of their governmental activity, and concluded that the exemption indicates that states may be liable parties under CERCLA since "a limitation of liability is nonsensical unless liability existed in the first place." 491 U.S. at __, 109 S.Ct. at 2280.

The Government has chosen to quote this phrase from *Union Gas* to make its point. As quoted, the phrase includes an interpolation which changes the context. The Government's quote, including the interpolation, is "'this limitation of liability is nonsensical unless liability [due to possession of title] existed in the first place." United States' Response at 12 (Doc. 41). However, the Supreme Court never discussed the meaning of the exemption nor what sort of ownership rights by a state made the exemption necessary. Rather, the Court discussed the exemption in the context of whether Congress imposed liability on a state at all. The phrase, therefore, is better read to mean "this limitation of liability is nonsensical unless liability [of a state] existed at all."

This reading of the phrase is particularly appropriate in light of the nature of the exemption. Congress exempted states and local governments from CERCLA liability when

the ownership interest was acquired involuntarily as a result of the state or municipality's sovereign function. An example is a title acquired through a tax delinquency. The ownership interest acquired in those instances includes greater rights than the trustee has under an Illinois land trust. Therefore, the exemption is not premised on merely holding title; it is based on protection of a state or municipality when it involuntarily acquires an ownership interest as a result of its sovereign functions. The ownership or control acquired by the state or municipality would have to be sufficient to make the state or municipality liable generally under CERCLA. For this reason, the exemption is not helpful in determining whether the trustee of an Illinois land trust is an owner of a facility under CERCLA.

The second exemption on which the Government relies exempts any person who holds indicia of ownership to protect his security interest in the facility and does not participate in the management of the facility. 42 U.S.C. §9601(20)(A)(ii). At a hearing in this case, the Government argued that this exemption precludes any other exemption based on holding title without participating in the management of the facility. This argument is a variation of the maxim of statutory construction *expressio unius est exclusio alterius.*[3] "The general rule of statutory construction is that the enumeration of specific exclusion from the operation of a statute is an indication that the statute should apply to all cases not specifically included." *Matter of Cash Currency Exchange, Inc.*, 762 F.2d 542, 552 (7th Cir.), *cert. denied* 474 U.S. 904 (1985).

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[3]/ "The mention of one thing implies exclusion of another. . . . Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." Black's Law Dictionary 581 (6th ed. 1990).

The maxim, however, has limits. "The maxim is not a rule of substantive law and is only one of statutory construction whose use is occasionally rejected." *Matter of Chicago, Milwaukee, St. Paul & pacific Railroad Co.*, 658 F.2d 1149, 1158 (7th Cir. 1981). "[F]actually, there should be some evidence the legislature intended its (expressio unius) application lest it prevail as a rule of construction despite the reason for and spirit of the enactment." 2A N. Singer, *Statutes and Statutory Construction* §47.25 at 209 (C.D. Sands 4th ed. 1984). Courts should be especially hesitant in applying this maxim, which requires a negative implication, in interpreting statutes such as CERCLA, which "was hastily and inadequately drafted." *United States v. A&F Materials Company, Inc.*, 578 F. Supp. 1249, 1253 (S.D. Ill. 1985).

The application of the maxim *expression unius est exclusio alterius* is inappropriate in this case. First, it is not clear that the Trustee must rely on an exception to liability under CERCLA. The definition of owner, although broad, requires some indication of control. The Trustee has no control over the facility, although it holds both legal and equitable title. The question can be properly categorized as an interpretation of the scope of the liability provision rather than the scope of the exemption. In other words, the exemption for holders of a security interest is of a different nature than the exclusion of the trustee of an Illinois land trust from the definition of owner. Because different ownership rights are implicated, the maxim does not control.

Second, the application of the maxim in this case would contravene the policy of the statute. The statute excludes persons who do not participate in the management of the facility and hold indicia of ownership only to protect a security interest. These persons would have transacted some form of business with the owners of the facility in order to receive the

security interest. Presumably, the amount of the transaction would be substantial if it involved a security interest in the facility. It is inconsistent to exempt these persons while holding liable a bank which merely administers the title for a nominal yearly fee.

For these reasons, the Court concludes that the exemptions relied upon by the Government do not warrant a finding that the Trustee is an owner of a facility for purposes of CERCLA liability. Furthermore, because the trustee of an Illinois land trust has no ownership or control interest which would implicate the policies behind CERCLA, the Court concludes that the trustee cannot be liable under CERCLA.

Last, the Government argues that, even if this Court were to conclude that a trustee of an Illinois land trust is not an owner under CERCLA, dismissal is inappropriate because genuine issues of material fact are in dispute. The Court disagrees. The rights and duties of a trustee of an Illinois land trust are governed by law. The complaint does not allege that the trustee acted beyond the scope of its rights under Illinois law. Since the scope of a trustee's rights is defined by law, no further factual development is necessary to decide the motion.

The Government may, of course, amend its complaint. The Government may amend its allegations against Trust 454 to allege that the trust exercised some control over the management of the site or received some benefit from its role as trustee beyond its nominal fee for holding the title. Another possibility is that the Government may amend its complaint to name the beneficiary of the trust as a defendant.

Defendant First Granite City National Bank's motion to dismiss (Document 30) is **GRANTED**. The Government is given 30 days to amend their complaint, if it so desires.

IT IS SO ORDERED.

DATED: 4/23/92

James L. Foreman

CHIEF JUDGE

EOD: 4-24-92